# 5 Towards a principled European criminal policy: some lessons from the Nordic countries

*Raimo Lahti*

## Introduction

Before the entry into force on 1 January 2009 of the Treaty of Lisbon,[1] there was not space for a comprehensive and coherent European criminal policy within the European Union (EU). The Treaty of Lisbon changed the legal framework for such policy planning, because the Treaty grants the EU a limited competence in the fields of both criminal and substantive criminal procedure. In particular, the EU can adopt under Article 83 of the Treaty on the Functioning of the European Union (TFEU) directives with minimum rules of EU criminal law for certain crimes. In addition, Article 325 (4) of the Treaty provides for the possibility to take measures in the prevention of and fight against fraud affecting the financial interests of the EU.

The new legislative framework gives a stronger role to the European Parliament through the co-decision process and a full judicial control to the European Court of Justice. The Charter of Fundamental Rights is legally binding by the Treaty of Lisbon. Therefore, a better balance for human rights considerations in respect of the efficiency criteria has been established.

The Communication 'Towards an EU Criminal Policy', issued by the European Commission on 20 September 2011, aims at presenting a principled framework for ensuring the effective implementation of EU policies through criminal law. According to the Communication, the Treaty of Lisbon considerably enhances the progress with the development of a coherent EU criminal policy which should be based on both the effective enforcement and a solid protection of fundamental rights. The Communication calls for a careful consideration of, for example, whether to include types of sanction other than imprisonment and fines to ensure a maximum level of effectiveness, proportionality and dissuasiveness, as well as the need for additional measures, such as confiscation.[2]

1 *Official Journal of the European Union* (OJ), 9 May 2008, 2008/C 115; the newest consolidated version, 26 October 2012/C326.

2 European Commission, 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law', COM(2011) 573 final, 20 September 2011, especially 7–8, 12.

European Parliament Resolution of 22 May 2012, on an EU approach to criminal law, encourages the Commission to put forward measures that facilitate more consistent and coherent enforcement at national level of existing provisions of substantive EU criminal law, without prejudice to the principles of necessity and subsidiarity. It also encourages the Commission to continue to include in its impact assessments the necessity and proportionality test, to draw on the best practices of those Member States with a high level of procedural rights guarantees, to include an evaluation based on its fundamental rights checklist and to introduce a test specifying how its proposals reflect the general principles governing criminal law.[3] It is noteworthy that the resolution lists separately the principles which govern criminalisation on one hand and criminal law on the other: the first-mentioned include the *ultima ratio* principles of necessity and proportionality (criminal law as a means of last resort) and the last-mentioned include the principles of individual guilt *(nulla poena sine culpa)*, of legal certainty *(lex certa)*, of non-retroactivity and of *lex mitior* as well as the principles of *ne bis in idem* and of the presumption of innocence.[4]

The positive influence of the 'Manifesto on European Criminal Policy' (2009), prepared by fourteen university professors from the Member States of the EU,[5] is discernible in those EU documents. According to the Manifesto, the fundamental principles of criminal policy consist of the requirement of a legitimate purpose, the *ultima ratio* principle, the principle of guilt (*mens rea),* the principle of legality (the *lex certa* requirement, the requirements of non-retroactivity and *lex mitior*, *nulla poena sine lege parlamentaria*), the principle of subsidiarity, and the principle of coherence.

The first legislative instrument, which is based on Article 83(2) TFEU, is Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse.[6] Therefore, the grounds for this market abuse directive are particularly interesting in assessing whether this kind of approximation of criminal laws of the Member States 'proves essential to ensure the effective implementation of a Union policy' and whether the newly emphasised criminalisation principles are *de facto* applied.

The objective of the Directive 2014/57/EU is, according to the preamble, to ensure effective implementation of the European policy for ensuring the integrity of the financial markets set out in Regulation (EU) No 596/2014 on

3 European Parliament Resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)), OJ 2013/C 264 E/02, points 6 and 8.

4 *Ibid*., points 3 and 4.

5 The Manifesto was originally published in December 2009 in the German online journal *Zeitschrift für Internationale Strafrechtsdogmatik* (www.zis-online.com) in seven languages. The Manifesto is also printed in the *European Criminal Law Review* in 2011, at 86–103. Within the project on a European Criminal Policy Initiative also a 'Manifesto on European Criminal Procedure Law' has been published in 2013 (see *ZIS* 2013, at 430 *et seq.*). See also discussion by Harding in Chapter 8 of this volume.

6 Market abuse directive, OJ L 173/179, 12 June 2014.

market abuse:[7] 'It is essential that compliance with the rules on market abuse be strengthened by availability of criminal sanctions which demonstrate a stronger form of social disapproval compared to administrative sanctions.' Minimum rules should be established with regard to the definition of criminal offences by natural persons, liability of legal persons and the relevant sanctions.[8]

The aim here is to critically analyse the values, interests and guiding principles for a regional (European) criminal policy from a perspective of its sub-region (Finland and other Nordic countries). The above-mentioned documents and legal instruments of the EU illustrate the recent approach of EU institutions to criminal law. In Scandinavia, there is much criticism of the approximation of criminal laws of the Member States.[9] Therefore it is useful to highlight some characteristics of the 'Nordic model'.[10] Three issues will be elaborated in more detail, namely tensions and priorities in criminal policy, defensive versus offensive criminal law policy and the *ultima ratio* principle, as well as the role of punitive administrative sanctions.

## Tensions and priorities in criminal policy

Harding and Banach-Gutierrez have analysed the Communication 'Towards an EU criminal policy' and framed it around three major tensions in contemporary criminal law development: criminalisation versus soft compliance, security versus justice and rights protection, and globalisation versus local diversity.[11] Their list of these tensions is illustrative. For instance, in penal theories a basic tension is often described by the contradiction of utility versus justice. Security and utility are comparable concepts.

According to utilitarian theories, the justification of punishment is dependent on how efficient the deterrent, rehabilitating or incapacitating effects of the punishment are, whereas the concept of justice is more connected with the retribution theories. The theory on the expressive function of punishment – demonstration of social disapproval – lies in the borderline, because its justification has been based both on the principle of utility (efficiency) and that of justice.[12] The mechanism through which the general preventive effect of punishment should be reached is not deterrence in the first place but the social-ethical disapproval which

7 Market abuse regulation, OJ L 173/1, 12 June 2014.

8 Market abuse directive, note 6 above, preamble, points 6, 7 and 18.

9 See e.g. Greve, V. (1995), 'The European Union and National Criminal Law', *Scandinavian Studies in Criminology*, 14, 185–203.

10 Cf. generally Suominen, A. (2011), 'The Characteristics of Nordic Criminal Law in the Setting of EU Criminal Law', *European Criminal Law Review*, 1, 170–187.

11 Harding, C. and Banach-Gutierrez, J. B. (2012), 'The Emergent EU Criminal Policy: Identifying the Species', *European Law Revue,* 37, 758–770.

12 See e.g. Raimo Lahti, R. (1985), 'Punishment and Justice – A Finnish Approach', Beiheft 24, *Archiv für Rechts- und Sozialphilosophie* (ARSP), 257–61 (260–61).

affects the sense of morals and justice – general prevention instead of general deterrence, without calling for a severe penal system.[13]

This theory has much support in the Nordic legal thinking when the preconditions for the legitimacy of the penal system are also emphasised. The public must have trust that the criminal justice system operates in an acceptable manner, and it is important to follow such principles as equality, fairness and proportionality in its structure and operation. The emphasis on non-utilitarian values of the criminal justice system – fairness and humaneness – leads to the decrease in the repressive features (punitiveness) of the system, for example through the reduction of prison rate and the introduction of alternatives to imprisonment.[14]

An important effect of the new criminal and sanction policy can been seen in the reduced use of custodial sentences in Finland. Since the mid-1970s, the relative number of offenders sentenced to unconditional imprisonment was on the decrease until 1999: from 118 in 1976 to 65 in 1999 per 100,000 of population and compared to the level in the other Nordic countries. At the same time, the development on registered criminality signalled a similar trend in all of the Nordic countries so that a dramatic cut in the prisoner rate in Finland did not result in a proportionate increase in the incidence of crime compared with other Nordic countries where the prisoner rate stayed quite stable.[15] In 2000–2005 the size increased, to 90 in 2005, but in the most recent years the level seems to be normalised to 65–70 per 100,000 population.

This effect should be assessed with a view to the general objectives and values of the criminal policy that was adopted in Finland. Cost-benefit thinking in policy-making – as it was originally formulated in the late 1960s[16] – suggests that we should aim at the reduction and distribution of the suffering and other social costs caused by crime and by the control of crime. In addition to crime prevention, a strong emphasis should be put on the arguments of justice and humaneness. For instance, the argument of justice requires a just allocation of social costs of crime and crime control among different parties, such as society, offenders

13 See especially Andenaes, J. (1974), *Punishment and Deterrence,* Ann Arbor: University of Michigan Press, especially Chapter 4 ('The Moral or Educative Influence of Criminal Law'). See also Mäkelä, K. (1974), 'The Societal Tasks of the System of Penal Law', *Scandinavian Studies in Criminology,* 5, 47– 67.

14 For more detail, see Lahti, R. (1985), 'Current Trends in Criminal Policy in the Scandinavian Countries', in: Bishop, N. (ed.), *Scandinavian Criminal Policy and Criminology*, Copenhagen: Scandinavian Research Council for Criminology, 59–72 (66–9); Lahti, R. (2000), 'Towards a Rational and Humane Criminal Policy – Scandinavian Penal Thinking', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 1, 141–55 (145–9).

15 For more detail, see Törnudd, P. (1993), *Fifteen Years of Decreasing Prisoner Rates in Finland*, Helsinki: National Research Institute of Legal Policy (NRILP); Lappi-Seppälä, T. (1998), *Regulating the Prison Population,* Helsinki: NRILP,

16 See originally Törnudd, P. (1969), 'The Futility of Searching for Causes of Crime', *Scandinavian Studies in Criminology*, 3, 23–33; Törnudd, P. (1995), 'Setting Realistic Policy Goals', *Scandinavian Studies in Criminology*, 14, 37–50. See also Lahti, R., (1972), 'On the Reduction and Distribution of the Costs of Crime', *Oikeustiede-Jurisprudentia* (Helsinki), 2, 298–313.

and victims, and the argument of humaneness speaks in favour of parsimony and leniency of penal sanctions and the respect of human dignity in crime control.

The reduced prisoner rate should be assessed in relation to the preventive effects of the system of criminal sanctions. The above-described Nordic observation, in addition to other criminological data, is an argument against the fear that a cut in the inmate count will result in a proportionate increase in the incidence of crime. Accordingly, the variations in the prisoner rate should not be looked at as phenomena separate from other events, neither should the criminal policy changes since the late 1960s be seen merely as the results of some ideological agenda pursued by a group of penal experts.

Tapio Lappi-Seppälä has studied the relationship between the penal policy and the prisoner rate extensively. His conclusions include the following contentions: penal severity is closely associated with the extent of welfare provision, differences in income equality, trust and political and legal cultures. So the Nordic penal model has its roots in consensual and corporatist political culture, a high level of social trust and political legitimacy, as well as a strong welfare state. These different factors have both indirect and direct influences on the contents of penal policy.[17]

The results of Lappi-Seppälä's studies suggest that the developments of criminal policy must be assessed in the light of simultaneous structural (social, political and economic) and cultural changes. The criminal policy decisions must be examined with a discerning eye. These decisions should be based on research and rational reasoning. At the same time, structural and cultural circumstances of the society and the increased interdependence of states should be taken into account. The strengthened interaction between different criminal policy models (such as a Scandinavian type) on the European and global level is to be recognised. It is a major challenge, in this respect, to be able to react to, and to influence, the development of criminal law and criminal policy in the European Union and in other international organisations (especially the United Nations).

## Defensive versus offensive criminal law policy and the *ultima ratio* principle[18]

In a notable Scandinavian anthology, in which the main message throughout is a warning against increased penal repression, Nils Jareborg distinguishes defensive penal law policy and offensive penal law policy as two different ideal models for decision-making on the criminal justice system. Jareborg argues for the defensive model, whose principles for criminalisation and procedural safeguards correspond

17 For more detail, see Lappi-Seppälä, T. (2008), 'Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies', *Crime and Justice*, 37, 313–87; and the same author, (2011), 'Explaining Imprisonment in Europe', *European Journal of Criminology*, 8, 303–328; and (2012), 'Penal Policies in the Nordic Countries', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 13, 1, 85–111.

18 See also generally Lahti, R. (2010), 'Das moderne Strafrecht und das ultima-ratio-Prinzip', in: *Festschrift für Winfried Hassemer,* Heidelberg: C. F. Müller Verlag, 439–48.

to the penal law ideology of a *Rechtsstaat* (a state governed by the rule of law), whereas the offensive approach aims at solving emerging social problems and its legitimacy lies in its efficiency of crime prevention. In the defensive model, criminalisation should be used only as a last resort or for the most reprehensible types of wrongdoing, whereas in the offensive approach the threat of penal sanctions is used not as a last resort, but often in the first place and even for minor transgressions.[19]

In a later article, Jareborg[20] deals in more detail with the *ultima ratio* principle. According to him, it should be perceived as a meta principle, which summarises the criminalisation principles and is of some normative importance. Criminalisation as last resort can hardly be distinguished from the principle of subsidiarity,[21] and it may then encompass the whole of the arguments restricting criminalisation in the sense of *in dubio pro libertate*. There are three sub-principles when deciding whether to punish and with what severity: a) the penal value principle (including the requirements of blameworthiness and retrospective proportionality); b) the utility principle (covering arguments concerning criminalisation needs, control costs and inefficiency); and c) the humanity principle (including the requirement of prospective proportionality and arguments concerning the victim's interests and some sorts of control costs).

For Nils Jareborg the *ultima ratio* principle has only some normative significance, and it is more a question of criminal justice ethics. Panu Minkkinen has compared a continental (German) and an Anglo-American approach to the last resort principle with the conclusion that while the Anglo-American approach understands the last resort principle more in terms of a moral restraint in the use of criminal legislation, the German approach is more inclined to infer the principle from the constitutional framework of the State under the rule of law. For criminal law doctrine, the last resort principle is first and foremost a critical mode of reasoning.[22] In his later article, Minkkinen claims that *ultima ratio* is a politico-moral principle with constitutional significance. At the same time, this last resort principle has always been fuzzy: 'The "last resort" is the human rights fluff that the constitutional culture of "good governance" requires to justify its cultural apparatuses, and not more.'[23]

In the modern criminal law doctrine in Finland, criminalisation principles are derived from the fundamental rights doctrine – the *ultima ratio* principle

19 Jareborg, N. (1995), 'What Kind of Criminal Law Do We Want?', *Scandinavian Studies in Criminology*, 14, 17–36.

20 Jareborg, N. (2005), 'Criminalization as Last Resort *(Ultima Ratio)*', *Ohio State Journal of Criminal Law*, 2, 521–34.

21 See also European Committee on Crime Problems, (1980), *Report on Decriminalisation*, Strasbourg, 29: 'we endorse the principle of the subsidiarity and minimalisation (ultima ratio principle) of penal sanctions.'

22 Minkkinen, P. (2006), '"If Taken in Earnest": Criminal Law Doctrine and the Last Resort', *Howard Journal,* 45, 521–536 (533).

23 Minkkinen, P. (2013), 'The "Last Resort": A Moral and/or Legal Principle?', *Oñati Socio-Legal Series,* 3, 21–9 (28–9).

primarily from the principle of (prospective) proportionality (necessity): fundamental rights may be restricted by means of criminal law only when the aim of protecting a legitimate legal interest *(Rechtsgut)* cannot be achieved by any means less invasive. The same applies to criminalisation principles in a more general sense as well.[24] The effect of criminalisation principles serving to restrict the scope of criminal legislation has by some commentators been expanded to the level of application of law, yet the application of such an interpretative effect remains unclear. In my view, the values underlying human rights and fundamental rights often serve as a counterweight to the utilitarian criminal policy aspects underlying a teleological interpretation, which gives rise to balancing the argumentation between restrictive and expansive interpretation. No common standard may be given for the order of priority or weight of such conflicting arguments, however.

A heightened focus on human rights and fundamental rights has had a positive effect on the debate concerning criminalisation principles, as it has allowed an increasingly differentiated examination of the weight of human rights and fundamental rights and their merits, and has thus added to criminal law theory. In earlier Finnish criminal law thinking, the argumentation concerning criminalisation principles was based on moral philosophy and/or criminal policy arguments only. However, it must be noted that an approach of legal positivism relying on human rights and fundamental rights will not even in future suffice as a foundation for criminal law theory.

The basic values and principles and values guiding the criminal justice system – such as utility, justice and humanity – cannot be reduced into considerations of fundamental rights or human rights without any remainder. Accordingly, criminal legislation aiming at rationality must be rational with regard to both goals and values, whether such justifying grounds are based on research or rational deliberation. The grounds giving legitimacy to the system have an effect at the various steps of the justification chain at the level of both legislation and application of the law. This kind of reasoning can be characterised as pragmatic-rational criminal law thinking. It is in a certain kind of conflict with the critical criminal law theory or critical legal positivism.[25]

What gives rise to tension between the emphases of pragmatic-rational and critical criminal law theory is their attitude towards the *(neo)* criminalisations that are characteristic of the welfare state, concerning the regulation of issues such as economic activity, environmental protection and industrial safety. In Nils Jareborg's terms, there is tension between the defensive and offensive penal law policy. The criminal law reform in Finland was started with those new forms of criminality. The total reform of Penal Code aimed at regulating new types of wrong, which on the basis of an assessment of their harmfulness and

24 For more detail, see Melander, S. (2008), *Kriminalisointiteoria – rangaistavaksi säätämisen oikeudelliset rajoitukset [A Theory of Criminalization – Legal Constraints to Criminal Legislation]*, Helsinki: Suomalainen Lakimisyhdistys.

25 See Minkkinen, 'If Taken in Earnest', note 22 above, at 533; Tuori, K. (2002), *Critical Legal Positivism*, Aldershot: Ashgate. See also Tuori, K. (2013), 'Ultima Ratio as a Constitutional Principle', *Oñati Socio-Legal Series*, 3, 6–20.

blameworthiness should be incorporated into the recodified Criminal Code. The new Criminal Code should handle various types of illegal activity in a more equal and fair way and thus increase its legitimacy among citizens. Thus the penal law policy was inclined towards an offensive one.[26]

There is also a strengthening tendency in the practice of the European Court of Human Rights (ECtHR) to infer positive obligations from the provisions of the European Convention of Human Rights (ECHR),[27] especially in respect to vulnerable people.[28] See, for instance, in *K.U. v. Finland*,[29] where a minor of twelve years old was the subject of an advertisement of a sexual nature on an Internet dating site. Finnish law at that time did not provide for the means to identify the person who placed the advertisement. The Court found there was of violation of Article 8 of the ECHR, because the gravity of the act at stake required efficient criminal law provisions.[30]

In consequence, criminal law is influenced by aims and values pulling in different directions, and criminal law is consequently developing in a more differentiated way. The significance of the *ultima ratio* principle in legislation and application of the law varies depending on the type of wrong, i.e. crime, when account in the consideration is also taken of the principle of fairness and/or positive obligations of criminal law which steer the criminal justice system. This presents a challenge to criminal law research, which must be able to identify the effects of such differentiation and become involved in the elaboration of somewhat differentiating general doctrines. With that in mind, I have personally brought up the general doctrines of economic criminal law. The aim within the European Union should be maximum coherence in economic criminal law, yet at the same time certain differentiation concerning the totality of criminal law can be accepted. Correspondingly, one might refer to international and transnational criminal law as sectors of the subject containing particular characteristics.

## The role of punitive administrative sanctions

Traditionally, the theories of criminal policy and criminalisation principles are usually elaborated with an eye to such unwanted forms of behaviour that are already defined as crimes under law, or the criminalisation of which is under consideration. Correspondingly, the word 'punitive' in such a context is perceived

26 Cf. the criticism by Winfried Hassemer: 'Kennzeichen und Krisen des modernen Strafrechts', (1992), in: Lahti, R. and Nuotio, K. (eds), *Criminal Law Theory in Transition: Finnish and Comparative Perspectives,* Helsinki: Finnish Lawyers' Publishing Company, 113–25.

27 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010.

28 See generally Ashworth, A. (2013), *Positive Obligations in Criminal Law*, Oxford: Hart Publishing, especially Chapter 8.

29 ECrHR 2 December 2008, *K.U. v. Finland,* Appl. No. 2872/02.

30 For more detail, see Ouwerkerk, J. W. (2012), 'Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?', *New Journal of European Criminal Law*, 3, 228–41 (238).

as referring to punishment under criminal law. During the last decades, it has been increasingly recognised that, in addition to criminal punishments, punitive (penal) sanctions are more and more introduced within the regimes of administrative law for transgressions outside the scope of criminal law.

Nowadays, the Europeanisation of criminal law through the influence of the ECHR and EU law makes it justifiable to use the term 'European criminal law' in a wide sense. Thus it comprises the norms governing behaviour and sanctions that originate in European law, regardless of whether the sanctions that the Member States may impose are in the nature of criminal law or administrative criminal law.[31]

Punitive administrative sanctions (typically punitive fees) have not been introduced in Finland or other Nordic countries, in keeping with a cohesive and consistent approach, and these sanctions have been governed under different laws, making up a disparate group. This starting point can be explained by a legal tradition in which the scope of criminalised behaviour is maintained extensively without any clear distinction between crime and other transgression of law *(Übertretung)*. There has not been place for such a consistent system of administrative criminal law as developed in German *(Ordnungswidrigkeiten)*, parallel to the criminal justice system proper. The aims of expediency and efficiency of the criminal proceedings were the objectives of simplified procedures within the penal justice system only.

In three Nordic countries (Finland, Norway and Sweden), legislative reforms have been recently prepared and partly implemented towards a more principled administrative penal law system.[32] In all of these countries, the legislative materials express the objective to create a consistent system for punitive administrative sanctions, but in none of these cases has such a unified system yet been created. There are numerous types of such sanction already in use, but a systematic review and rethinking of them is still under investigation. Depenalisation relates to primarily petty offences of a low penal value, with the consequence that the sanction to be imposed is a punitive fee instead of a fine.

The most severe punitive administrative fee that has been introduced applies to sanctioning cartels in the competition legislation, as modelled by the EU regulation. The reasoning behind that reform in Finland in the 1990s was (while harmonised legislation in the EU was pending) that the administrative process would provide greater flexibility and effectiveness. Competition law matters also call for specialised expertise. More important than the subjective culpability of the offender's actions is the harm caused by the illegal act on business in general.

In the Swedish legislative work (2013), it was argued that not only petty offences but also transgressions in the economic and financial sectors and

31 See, e.g., Klip, A. (2012), *European Criminal Law*, 2nd ed., Antwerp: Intersentia.

32 See *Rikosoikeuskomitean mietintö* [*Report of the Criminal Law Committee*] 1976:72 (Helsinki 1977); *Norges offentlige utredninger (NOU)* [*Norway's Official Investigations*] 2003:13 (Oslo 2003): Fra bot til bedring [From fine to remedy]; *Statens offentliga utredningar* (SOU) [*State's Official Investigations*] 2013:38 (Stockholm 2013): Vad bör straffas? [What should be punished?]

corporate activities in general could be suitable for depenalisation, and then the severe financial sanctions could serve the function of forfeiture, to take away the illegal profit. At the same time, it was recognised that the application of Article 6 of the ECHR concerning fair trial has not been limited only to sanctions defined as criminal punishments in national legislation, and the case law of the ECtHR concerning this provision thus set legal boundaries on the imposition of both types of punitive sanction.[33]

What kind of interplay exists between criminal sanctions (punishments) and punitive administrative sanctions? To what extent is it a proper legislative response for the systems of criminal sanctions and punitive administrative sanctions to co-exist in parallel? When the answer to the last mentioned question is affirmative, how can the appropriate and fair coordination of the systems and their compliance with the principles of *ne bis in idem* (double jeopardy) and of protection against self-incrimination – in line with the recent case law of the ECtHR and the Court of Justice of the EU – be ensured?

These questions are of considerable current interest at the European and global level when discussing the legal frameworks concerning market abuse, on one hand, and cartels on the other. The market abuse directive of 2014 prescribes criminalisation obligations to Member States but does not exempt them from the obligation to provide in national law for administrative sanctions and other measures for breaches provided in the market abuse regulation (596/2014/EU) 'unless Member States have decided . . . to provide only for criminal sanctions for breaches in their national law'.[34]

In a recent report on criminalising cartels in Finland, the main issue was formulated as to whether individual criminal responsibility of the heads of business should be introduced in addition to the existing administrative sanctioning of corporations.[35] Among the Nordic penal systems, Norway and Denmark recognise such individual criminal responsibility for cartel infringements, but in Sweden, personal responsibility has been enforced by applying a ban from participation in business activities.

The answer in the Finnish report was affirmative, with the reference to the aims and values of the recodified Criminal Code: criminalisation, which may involve the deprivation of liberty of the individual, communicates the social and ethical disapproval of the offence and would probably have a significant preventative effect; the fairness in allocating criminal responsibility would also be in support of such a solution. There would, however, arise problems in consolidating the administrative procedure against the corporation and the criminal process against

33 See especially the 'Engel criteria' worked out by the ECtHR when interpreting autonomously the concept of a 'criminal' [charge] under Article 6 of the ECHR: *Engel and others v. The Netherlands*, Appl. No. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976.

34 Market abuse directive, 2014/57/EU, 2014 OJ L 173, preamble, point 22.

35 The report *Kartellien kriminalisointi Suomessa* [*Criminalising Cartels in Finland*] (Helsinki 2014) was prepared at the Faculty of Law, University of Helsinki (authors: Ville Hiltunen and Raimo Lahti) by order of the Finnish Competition and Consumer Authority. See also the discussion by Günsberg in Chapter 14.

the individual(s). In the report, these problems are dealt with under the following sub-questions: right to a fair trial (protection from self-incrimination, *ne bis in idem*); the chronological relationship between the proceedings; exchange of data between the authorities; and the effects of criminalisation on the leniency system.[36]

The following tentative conclusions can be drawn from the reasoning in the Finnish legislative drafting. In the prevention of crime and other illegal activities in business and financial sectors, the significance and impact of various kinds of preventive tool and reactive enforcement systems on the achievement of the goals and value aims to be set shall be assessed from a comprehensive criminal policy and sanction policy perspective. Thus the examination of enforcement systems shall not be limited only to criminal justice policy or criminalisation principles; the approach to be adopted should instead be one of extensive enforcement policy and sanction policy assessment wherein the various forms of enforcement, such as punishments under criminal law and pecuniary administrative sanctions of a punitive nature, are subjected to a cost–benefit analysis.

The experiences gained from the Finnish legal reforms reinforce the view that the effective prevention of illegal activities in the business and financial sectors calls for the coordination of the regulation under criminal law and administrative law with the simultaneous comprehensive implementation of substantive law and other preventive and reactive tools. The socio-ethical disapproval demonstrated by the threat of punishment and sentencing – with imprisonment, when necessary – can have general preventive effects when the structure of criminalisation and the functioning of the criminal justice system are perceived to be fair and legitimate. The preventive role of criminal law alone is still very limited.

## Conclusions

EU criminal policy is emerging. The recent EU documents of the Commission,[37] and the European Parliament,[38] as well as the Manifesto on European Criminal Policy in 2009[39] of the academic community, include good guidelines for further legislative drafting within EU to achieve a more consistent and coherent criminal policy, and they are good starting points for deeper analyses and research. These documents also include a promise to continue the development of the EU criminal policy by resorting to a thorough evaluation of existing EU criminal law measures and to continuous consultation of Member States and independent experts.

Best practices in the Member States and characteristics of their legal cultures should be systematically studied and information about the results disseminated.

36 Cf. generally: Harding, C. (2015), 'The Interplay of Criminal and Administrative Law in the Context of Market Regulation: The Case of Serious Competition Infringements', in: Mitsilegas, V. *et al.* (eds), *Globalisation, Criminal Law and Criminal Justice. Theoretical, Comparative and Transnational Perspectives,* Oxford: Hart Publishing, 199–217.

37 Communication, note 2 above.

38 Resolution, note 3 above.

39 Note 5 above.

This would facilitate interaction and coordination between national criminal policies and the emerging EU criminal policy. The discussion here has illustrated some dimensions of the Nordic legal cultures and their penal policies with the purpose that these experiences could be utilised in assessing the prospects for common European criminal policy. On the basis of this review, I shall now shortly comment on some details of these recent EU documents.

According to the Commission's Communication, an EU criminal policy is particularly warranted in respect of Article 83 (2) TFEU. This is true, but in order to enhance a more coherent criminal policy within the EU, good governance would require that the fundamental principles should guide the whole EU criminal legislation as much as possible. The main objective behind the ancillary competence regulated in Article 83 (2) TFEU is effectiveness (efficiency), and the same objective characterised the EU policy on sanctioning.[40] This objective is in collision with the traditional restraining principles of criminalisation, such as *ultima ratio* principle.[41]

There should be available convincing criminological research as clear factual evidence for assessing the effectiveness of difference sanctions or other measures in the enforcement of EU legislation.[42] The demand for measures that are effective, proportionate and dissuasive seems to reflect a belief in deterrence and severe punishment in relation to which there is much scepticism in the Nordic countries.[43] There is a concern that EU criminal law may lead to increased repression in the Nordic countries.[44] In Scandinavia, crime prevention instead of repression, the legitimacy of criminal justice system, a relatively low level of punitiveness, and humaneness in sanctioning are important values.[45]

In the Commission's Communication, among the fundamental principles guiding EU criminal legislation are the principles of subsidiarity, the protection of fundamental rights, necessity and proportionality *(ultima ratio)* at the level of enacting criminal law measures, and necessity and proportionality at the level of specifying criminal measures. In addition, the legality principle (legal certainty) is mentioned as a principle guiding 'minimum rules' regarding the definition of criminal offences and sanctions.

40 See e.g. Melander, S. (2014), 'Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal Law', *New Journal of European Criminal Law*, 5, 274–300 (285).

41 See e.g. Huomo-Kettunen, M. (2014), 'EU Criminal Policy at a Crossroad between Effectiveness and Traditional Restraints for the Use of Criminal Law', *New Journal of European Criminal Law*, 5, 301–26.

42 See also the discussion by Harding in Chapter 8 of this volume.

43 Rapporteur Cornelis de Jong in his *Report on an EU approach on criminal law* (2010/2310(INI)) at the Committee on Civil Liberties, Justice and Home Affairs (24.4.2012, A7-0144/2012, European Parliament) took the view that 'all too easily criminal law provisions are proposed for their supposedly symbolic and dissuasive effects'.

44 See e.g. Elholm, T. (2009): 'Does EU Criminal Cooperation Necessarily Mean Increased Repression?', *European Journal of Crime, Criminal Law and Criminal Justice*, 17, 191–226.

45 As to the propensities towards punitiveness in four Nordic countries (Denmark, Iceland, Sweden and Finland), see e.g. Balvig, F. *et al.* (2015), 'The Public Sense of Justice in Scandinavia: A Study of Attitudes towards Punishments', *European Journal of Criminology*, 12, 342–61.

When comparing the Communication and the Manifesto on European Criminal Policy, differences can be seen, in particular, to what extent the requirement of a legitimate purpose is emphasised. The Manifesto rightly requires that the following criteria should be fulfilled: that the interests to be protected should be derived from a) the primary legislation of the EU, and b) the Constitutions of the Member States; that the fundamental principles of the EU Charter of Fundamental Rights are not violated; and that the activities being regulated could cause significant damage to society or individuals. As the Parliament's Resolution points out, the damage can be either pecuniary or non-pecuniary.

But in none of these documents is the relationship between the principles of *ultima ratio,* subsidiarity and proportionality elaborated very much. There is much academic discussion on the principle of *ultima ratio,* but its content is still quite vague from a pan-European perspective.[46] In any case, the principles of *ultima ratio*, subsidiarity and proportionality are keenly connected with one another, especially in respect of EU criminal law. Their legal basis lies in the EU legislation.

Both the Communication and the Manifesto point to the general principle of proportionality in Article 5(4) Treaty on European Union (TEU) and in the EU Charter of Fundamental Rights (especially Article 49(3)) as the legal (constitutional) basis for the *ultima ratio* principle. Criminalisation and criminal sanctions entail social stigmatisation (moral condemnation) and, when resorting to imprisonment as penalty, the most intrusive measure. The national criminal justice systems are traditionally closely linked to the State's power and its value system, and in democratic Member States, reasonable legitimacy of State institutions and trust to their operation is normally attained.[47]

The democratic legitimacy of (and trust of) the EU institutions and its criminal legislation is much more difficult to attain. If we wish to cultivate a similar trust in the activities and institutions of the EU, we must increase the familiarity with common European values among the public, improve openness of the decision-making process and reinforce the status and rights of individuals. The legitimacy argument also strongly supports the demand of developing criminalisation principles and other general principles governing criminal law at the level of EU, as pointed out in Resolution 2010/2310 (INI).

As to the principles of subsidiarity and proportionality and their interaction, the legal (constitutional) basis for them is provided in Article 5 (3)-(4) TEU.[48] These provisions imply that the principles of subsidiarity and proportionality are legally binding, increasingly important principles of EU criminal law and the

46 See especially the papers presented at the workshop '*Ultima ratio*, a Principle at Risk. European Perspective', in 2012 in Oñati, Spain: 3 *Oñati Socio-Legal Series* 2013 (1); also, the special issue on the Effectiveness of EU Criminal Law (eds Melander, M. and Suominen, A.), *New Journal of European Criminal Law*, 5, third issue of 2014.

47 See generally Tankebe, J. and Liebling, A. (eds) (2013), *Legitimacy and Criminal Justice. An International Exploration*, Oxford: Oxford University Press.

48 See also Protocol (No. 2) on the application of the principles of subsidiarity and proportionality and the so-called 'emergency brake' in Article 83 (3) TFEU.

criteria for their assessment and the procedures for their implementation should be developed. The case law of the European Court of Justice will be significant in this respect.[49]

Normally, a distinction is made between the principles of subsidiarity and proportionality by their different scope of application and legal effects. The principle of subsidiarity is applicable in assessing whether the EU should exercise its powers; the proportionality test answers the question of how the EU should exercise its powers. Nevertheless, these principles are keenly interrelated. Proportionality is a principle applied to (alleged) conflicts between two kinds of interest: the individual's interest for autonomy, and public interests. The proportionality principle is traditionally further divided into three tests: a) suitability, b) necessity (cf. *ultima ratio*) and c) proportionality *stricto sensu*.[50]

The principle of proportionality has in the field of criminal law not only the dimension of *prospective* proportionality. It has also the dimension of *retrospective* proportionality according to Article 49(3) of the EU Charter of Fundamental Rights on the severity of penalties. As indicated in the Commission's Communication, in the assessment of proportionality (necessity), the legislator needs to analyse whether measures other than those of formal criminal law, in particular punitive administrative sanctions, could address the problems more effectively, and to what extent various types of sanction should be introduced in *parallel*. For example, punitive administrative sanctions could be reserved for minor transgressions, and criminal liability and sanctions could be preserved for more serious offences; or administrative sanctions could be imposed on corporations, but it would not exclude individual criminal responsibility of the heads of these corporations.

When taking the principles of subsidiarity and proportionality seriously and requiring thorough analyses from the impact assessments preceding legislative proposals, we need much more comparative research on criminal law, criminology and criminal justice.[51] We also need much more evidence-based criminological research to be utilised in criminal policy planning and as a foundation for rational criminal policy. This is particularly true in relation to the decision-making and actors within the EU, where criminal policy has not so far been made on the basis of coherent conceptions and by utilising relevant criminological research. Collection of statistical data is not a sufficient basis for the analyses. There is also need for increased inter-institutional co-operation and coordination within EU organs.[52]

49 For more detail, see Melander (2013), 'Ultima Ratio in European Criminal Law', 3 *Oñati Socio-Legal Series*, note 46 above, at 42–61, with references to the case law.

50 See the conceptual analysis of Asp, P. (2007), 'The Notions of Proportionality', in: Nuotio, K. (ed.), *Festschrift in Honour of Raimo Lahti,* Helsinki: Faculty of Law, University of Helsinki, 207–19.

51 Again, see also the discussion by Harding, in Chapter 8.

52 See European Parliament Resolution 2010/2310 (INI), points 11–20.